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SUPREME COURT U.S.

No. 94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

CHATTANOOGA FOUNDRY & PIPE WORKS
AND
SOUTH PITTSBURG PIPE COMPANY
Plaintiffs in Error

vs.

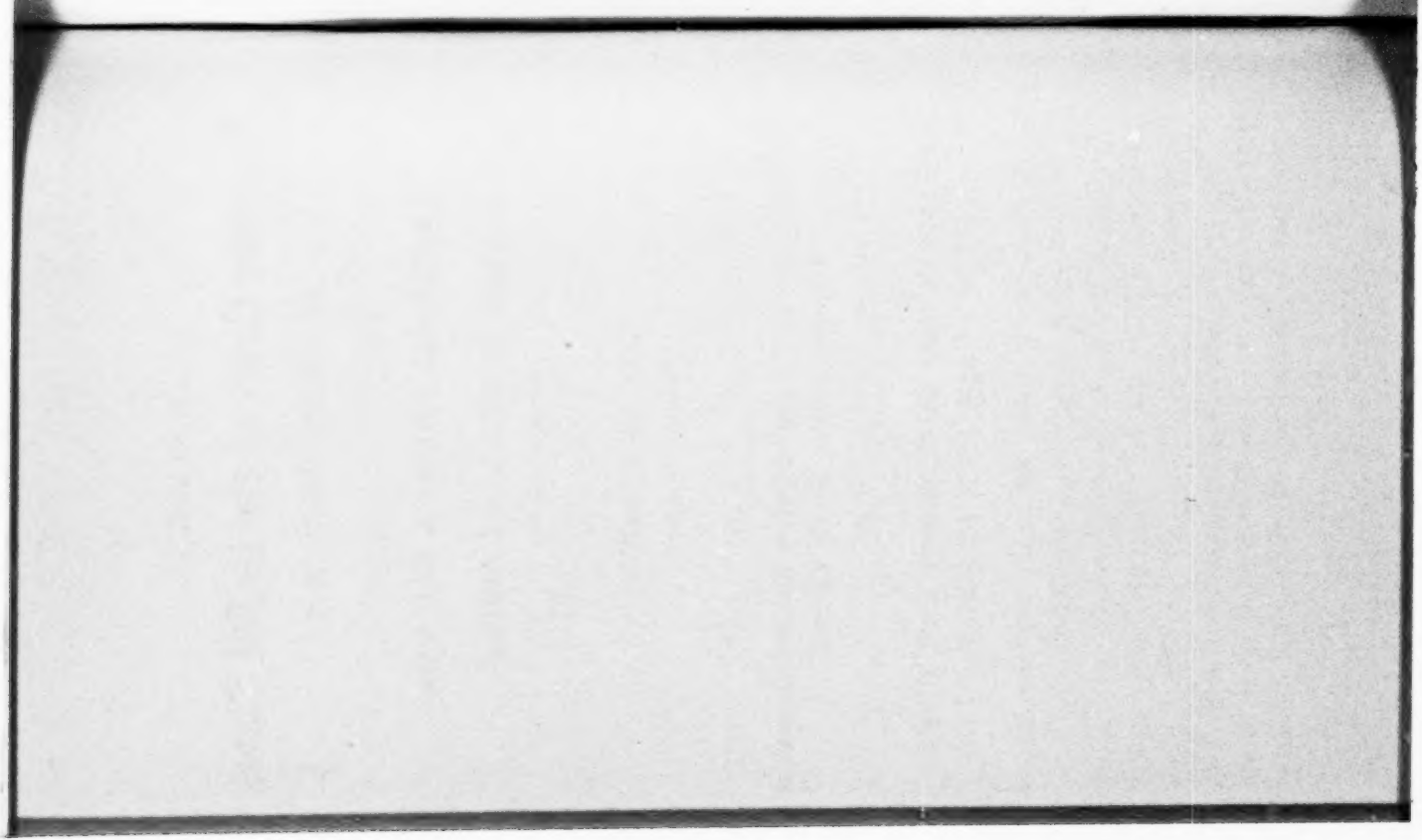
CITY OF ATLANTA
Defendant in Error

In Error to the United States Circuit Court of Appeals to the Sixth Circuit

Petition for Rehearing Filed in Behalf of Plaintiffs in Error

FOSTER V. BROWN
FRANK SPURLOCK
Attorneys

PURSE PRINT CHATTANOOGA



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PETITION FOR REHEARING AND RBIEF FOR PLAINTIFFS IN ERROR

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the above named plaintiffs in error, the Chattanooga Foundry and Pipe Works and South Pittsburg Pipe Company, showeth:

That by the judgment dated December 3, 1906, made by this Honorable Court in the above mentioned cause, it was ordered that the judgment of the Circuit Court of Appeals of

the Sixth Circuit be affirmed and that the said plaintiffs in error pay to the defendant in error the sum of seven thousand dollars ($7,000.00) with interest and costs of this court. That the said judgment is, as petitioners are advised and humbly submit, erroneous, and the same ought to be reversed in so far as it holds; (1) that the suit for damages authorized by the Seventh Section of the Anti-Trust Act is not penal in its character; (2), that it is not a suit for injury to property; (3), that the said suit was not barred by the statute of limitations of the State of Tennessee at the time the same was instituted in one year as a suit for statute penalty; (4), that it was not barred in three years as an injury to property. That for said reason the judgment of the Circuit Court of Appeals ought to be reversed; and they humbly pray that said judgment of this Honorable Court, may be so altered as to reverse the judgment of the lower court, and in such other manner as may seem meet under the circusmstances of this case.

That said cause may be reheard by this Honorable Court for the reasons herein stated and further shown in the brief hereto attached, and which they pray may be taken as a part of this petition.

Chattanooga Foundry and Pipe Works,
South Pittsburg Pipe Company,

By Foster V. Brown and Frank Spurlock, Attorneys for Petitioners.

And we, counsel of petitioners, certify that in our opinion the matters stated in said petition are proper to be heard if this Honorable Conrt shall think fit.

FOSTER V. BROWN,
FRANK SPURLOCK.

I.

ON THE CONSTRUCTION OF SECTION SEVEN OF ANTI-TRUST ACT.

We ask this Honorable Court to reconsider its construction of the seventh section of the Act of Congress of July 2, 1890, because, as construed in the decision rendered, the broad common law distinction between injuries to persons and injuries to property, is overlooked.

In his work on Pleadings, Chitty says:

"Actions in form **ex delicto** are for injuries to the **absolute** or **relative** rights of **persons** or to personal or real property."

And, concerning the necessary parties to suits to recover damages for such injuries, he says the first thing to be determined is "the **interest** of the plaintiff **in** the matter affected." (Page 69.)

Blackstone's Commentaries, Book III., chapter 8, is devoted to wrongs "Respecting the Rights of Persons," distributed into **absolute** and **relative** rights. This chapter is deovted to actual injuries to the person including assaults, injuries affecting the health and reputation, deprivations of liberty, abduction, seduction, etc.

Book III, Chapter 9, of the same Commentaries, treats "Of Injuries to Personal Property." This chapter is devoted to all wrongs whereby the owner is injured in his property rights or in any maner deprived of any species of personal property.

In his work on "Torts," Cooley observes the same division. Among the wrongs which affect the bodily organization of individuals, or which deprive them of personal rights of any kind, he includes those affecting "Personal Security," "Slan-

der and Libel," "Injuries to Family Rights" and "Wrongs in Respect to Civil and Political Rights." Chapter VI. to Chapter IX.

"Wrongs in respect to Personal Property," and "Frauds, or Wrongs Accomplished by Deception," are the subjects of Chapters XV. and XVI. The last title covers every species of wrong by fraud including duress and extortion.

The same distinction between injuries to persons, and injuries to property, enters into the systems of limitations prescribed by the Codes of all of the States whose statutes and constitutions are founded on the Common Law of England.

In view of these statutes all injuries, considered abstractly, are either injuries **to the person** or injuries **to property**; but when considered with respect to the person, who sustains the damage, they are injuries to him either in his person or in his property. The language used by the Act of Congress authorizing the suit at bar is:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor," etc.

Here, Congress was considering the injury from the standpoint of the person who might sustain it; and the injury, for which he may sue, is described as one "in his business or property," as distinguished from the other class of injuries known to law. It would, indeed, be difficult to conceive how a contract in restraint of trade, or an illegal combination, monopoly or conspiracy, the things declared unlawful by the Act, could effect an injury except to property, or to a person in his business or property.

The present course of commerce is towards methods which may include many sales at excessive prices, fixed by combinations, and exacted from purchasers by coercion or duress of monopoly, or secured by the deceitful semblance of competition. While the courts of the United States are clothed with the

exclusive jurisdiction to redress these wrongs, "without respect to the amount in controversy," the statutes of limitations applicable are those prescribed by the laws of the several States. These suits may be brought in any Circuit Court of the United States in which any one of the members of the combination, or joint tort-feasors, may be found. The plaintiffs in these actions may sue in one State or another, as the defendant may be found, or they may single out this or that member of the combination according to his residence.

If the injury for which the suit may be brought is one to personal property, and this depends upon the construction of the Act of Congress, then a statute expressly relating to such actions will be found in the code of every State of the Union. Or, if the action is treated as one penal in its nature, it would likewise be barred by some short statute of limitations in most, if not all, of the States.

Congress evidently intended to provide for a class of numerous actions, many of them small in amount, and we respectfully urge that it could not have been intended to authorize suits upon stale demands, either for damages or a penalty, as these actions would become in the course of ten years.

II.

LIMITATION OF ACTIONS FOR INJURIES TO PROPERTY.

We also ask the Court to reconsider its construction of the Tennessee statute which bars in three years actions for "injuries to personal property" (Code 4470) "in which money only is demanded as damages." (Code 4438).

1. Because identical statutes in other states are held to include the various cases in which the party suing is any person who shall be injured in his property by reason of the wrong or tort of any other person.

2. Because there is no conflict between the decisions of the Courts of Tennessee construing the statute of that State and the decisions of the Courts of other States construing the same statute of limitations as a part of their codes.

3. Because, if the meaning of 4470 is doubtful, the manner of its enactment, as the Tennessee Courts hold, requires it to be construed as an embodiment or revisal of the Act of 1715

"INJURIES TO PROPERTY" IN STATES OTHER THAN TENNESSEE.

The wrong for which defendant in error sues was committed in the State of Georgia. The Code of that State provides:

> "Actions for injuries to personalty shall be brought within four years after the right of action accrues." (Section 3899, Code 1895.)

The Supreme Court of Georgia has recently held that "the master has a property right in the services of his servant, and a loss of services is in legal effect a damage to his personal estate; and the law limiting the time in which actions to recover for injuries to property may be brought, limits the right of action in such case." Frazier vs. Georgia Railroad & Banking Company, 101 Ga., 70, 77.

So in Georgia, as this statute is construed by the Courts of that State, if a person is injured in his business or property by the wrong of another, or his estate is lessened to the extent of the value of that of which he is deprived by fraud or duress, his action would be barred as one for an injury to property. And if the suit against petitioners had been brought in the Circuit Court of the United States, in one of the districts of Georgia, the statute quoted would have barred the action. But the suit, having been brought in the Circuit Court of the United States, in one of the districts of Tennessee, an identical statute of limitations is held not to apply. This diversity in

the application of statutes of limitations, identical in their terms, depending on whether the suit is brought in the Circuit Court of Georgia or Tennessee, is due to the holding of this Court that the injuries, for which suits may be brought under the Seventh Section of the Anti-Trust Act, are not injuries to property.

In **New York** it has been held that an action for damages occasioned by false representations is an action for "an injury to property" within the meaning of the New York statute of limitations. Miller vs. Ward, 41 Hun 600.

And also that an action for the fraudulent procurement of a deed is one for an injury to property. Laufer vs. Sayles, 39, N. Y. S., 377.

And in **Texas** it was held that an injury resulting from the seizure of a stock of goods under an attachment wrongfully sued out was barred in two years by a statute of limitations in the following language:

"Actions of trespass for injury done to the estate or the property of another."

It was said: "The word 'trespass' as here used, is used, not in a technical sense, but broadly, and means any act violative of the right of another through which injury is done to his estate or property." Bear Brothers & Hirsh vs. Mark & Kempner, 63 Tex. 298.

A **Statute** in the **Same Terms** and of the **Same Origin** in **Maryland. Same Questions Decided.**

Tongue vs. Nutwell, 31 Md., 302, 313, was an action for **mesne** profits, or **trespass quare clausum fregit**... The question was whether a statute of limitations in the following language was a bar: "All actions for trespass for injuries to real or personal property shall be commenced or sued within three years from the time the cause of action accrued."

We quote the decision on this question because it is an answer to the argument that prevailed in the case at bar.

"The counsel for the appellant have argued that the case does not fall within the section of the Code, because actions of trespass, q. c. f. **eo nomine,** are not therein mentioned, as they were in the original Act of 1715, Chapter 23, section 2; and because this suit is not instituted to recover damages for injury to the land.

"To this view we cannot give our consent; if it were correct, then would suits of this kind be without any limitation whatever. In our opinion, this section, in describing the several forms of action intended to be embraced, is a substantial codification of the 2d section of the Act of 1715, and to be construed in the same way.

"The words 'action for trespass for injuries to real property,' does not mean merely such actions as are instituted for the purpose of recovering damages for injuries to the land, but must be understood as embracing all actions for trespass for injury to the plaintiff's rights of property in the land. This is strictly an action of trespass, for injuries to real property, as are all actions of trespass. q.c.f., and as much within the operation of the Code as if it had been mentioned by its technical denomination as **trespass quare clausum fregit.**. Every unlawful entry by force into the lands of another is a trespass, and in contemplation of the law, an injury to the land; such a trespass is alleged in the declaration, and is the ground work of the present suit. It fails, therefore, as we have said, within the operation of the Code, and **must be commenced within three years from the time the cause of action accrues.**"

"INJURIES TO PERSONAL PROPERTY" AS THE TERMS ARE USED IN THE LAWS OF TENNESSEE.

In our former brief and argument, the conflict between the decisions of the Tennessee Courts on this subject, and

the conclusion reached by Judge Lurton, might have been urged with more confidence. And we now invite the attention of this Honorable Court to cases which are in accord, as we insist, with the rule in other states defining "injuries to personal property."

Before the Code of 1858 the value of a chattel fraudulently paid for in counterfeit bank notes, loss in the value of an article bought on fraudulent representations, a debt lost, where the credit was given on false and deceitful representations that the buyer was solvent and worthy of credit, were all treated as wrongs and injuries to personal property for which case was the property remedy: Love vs. Hogan, 5 Yer. 290; Allison vs. Tyson, 5 Hum., 449; Rossen vs. Hancock, 3 Sneed 434; and Gwinther vs. Gerding, 3 Head, 198. The persons suing in these cases must have been injured in their property. They had not sustained any "injuries to the absolute or relative rights of persons." All these actions were expressly included in the limitations prescribed by the Act of 1715, as actions on the case.

The Code of 1858 is a compilation of the statutes then in force, but its enactment into a system of laws was not intended to effect any radical change in these statutes, or the common law which was then and is still in force in Tennessee.

Section 4438 authorizes a common form of action for torts, or "all wrongs and injuries to the property and person in which money only is demanded as damages." Different forms are prescribed where it is sought to recover specific property.

But this section covered every action known to the law for injury either to the person, or to property, if money was demanded as compensation. It included trover, or actions for damages in money where specific property was wrongfully taken or destroyed. It included such actions as were

sued on in Love vs. Hogan, supra, and other cases cited in conjunction with it, in neither of which was the injury to specific property but to the person suing in his general estate.

Sections 4468 and 4469 bar all actions "for injuries to the person" and actions affecting reputation, liberty, and the family relations.

Section 4470 bars "actions for injuries to personal or real property, actions for the detention or conversion of personal property."

Section 69 defines "personal property" to "include money, goods, chattels, things in action, and evidences of debt."

What is meant by "injuries to property" as used in Section 4470 of the Code? By the Code definition the words expressly include injuries to tangible and intangible property. The actions they described are associated with actions for the wrongful detention of **specific** property, and with actions for conversion, or injuries resulting from the wrongful seizure or destruction of **specific** property. The section does not refer to injuries which a person may sustain in his absolute or relative rights of the person, for that is the object of the preceding section.

It must therefore refer to all wrongs by which a person is injured **in his property** otherwise than by the wrongful **detention** or **conversion** of specific property, and the intention was to bar all such kindred injuries by the same limitation of three years. This is the reasonable construction, and it harmonizes the provision of the Code with the Act of 1715, from which it was taken, and with the construction of similar provisions found in the Codes of other States. And we claim that it is the meaning of the Section as has been held by the Supreme Court of the State.

In Waggoner vs. White, 11 Heisk, 741, the declaration contained two counts. In one count there was joined a claim

for damages for an assault and battery on the person of plaintiff with a claim for forcibly seizing and carrying away divers articles of personal property.

The question before the Court was whether such joinder of actions in the same count was permissable under the sections of the Code relating to forms of action. These several sections were referred to and construed as a system, and it was held that an action for an injury to the person could not be joined, in the same count, with an action for an injury to property, for the reason that they would present distinct and diverse issues, relating to the method of assessing damages, and applying the statute of limitations.

Concerning the embarrassment that would result in applying the statute of limitations, it was said:

"Even in case of personal injury, where a wide discretion is given the jury in assessment of damages, as to the plea of statute of limitations and that a different time as bar to the actions is applicable to the case of injury to the person and injuries to the property the period of one year being applicable to the cause for injuries to the person, and three years to injuries to property. However incongruous this may appear to the common law pleader, there is perhaps less difficulty in this than the first matter we have suggested, (the assessment of damages) but still it tends greatly to embarrass the investigation. However, a jury might be instructed to apply a plea of one year to the personal wrong, and three years as the bar to the wrong to the property, and if the two statutes or periods were pleaded, then the application of the statutes might not be so difficult, though the rule in practice would be objectionable."

In the case of Railroad Company vs. Guthrie, (10 Lea, 432) the facts were that the Railroad Company, the plaintiff, had built a fence a mile and a quarter long on each side of

its right of way through the lands of the defendant Guthrie. The suit was brought for the alleged wrong of the defendant in removing the fence, and several causes of actions were stated in different counts: One was for the injury suffered by the Railroad Company in being compelled to pay for stock killed by it and which had strayed upon its tracks on account of the defendant's wrongful removal of the fence; another was "for the value of the rails alleged to have been removed and appropriated by defendant." It was held that an action of tort and an action of **indebitatus assumpsit,** stated in different counts, could be joined in the same declaration.

To the count for tort the defendant pleaded the three year statute of limitations barring "injuries to property," and it was held that if the killing of the stock was in legal contemplation caused by the removal of the fence the action was barred.

On this subject the Court said:

"The cause of action accrued in 1872, and for injuries to, or conversion of, personal property, the suit must be brought within three years from the time the cause of action accrued: Code, Sec. 2773 (Shannon 4470) The Statute of limitations, therefore, which is pleaded, is a complete defense in this aspect of the case."

Again it was said by the Court:

"It seems to have been the purpose of the suit, when it was first instituted, to recover the value of the stock so killed. But the statute of limitations of three years is a complete defense against this claim, even if the facts disclosed did not present an insuperable objection to such recovery."

In this case the defendant had not converted any specific property of the plaintiff; nor had he injured the plaintiff's property otherwise than by compelling plaintiff to pay out damages on account of the wrongful removal of its fence. And the injury was necessarily one to the plaintiff corporation in its property.

Again in Railroad vs. Conk, 11 Heis., 576, it was held that parties had their election to plead either according to the Code or in the form used at common law, thus showing that all actions in this State still have their common law nature and characteristics, and that an action on the case is in no wise different under the Code from what it was prior to its adoption. The case was an action in the form of trespass on the case for failing to transport according to contract a lot of hides from Nashville to Bristol. The lower Court denied the defendant the benefit of the statute of limitations because not well pleaded. For this reason the case was reversed and it was again before the Supreme Court in Conk vs. Railroad, 1 (Shannon) Tenn. Cases 410.

On this appeal it was held that the suit was barred by the three year statute of limitations. After reciting the fact that the statute of limitations adopted by the Code was not dependent upon the form of the action, it was said:

"There is no statute expressly applicable to the present action, but it must be governed by one or the other of the following sections. Sec. 2773 (Shannon's Code, Sec. 4470): 'Actions for injuries to personal or real property actions for the conversion or detention of personal property within three years from the accruing of the cause of action.' Sec. 2775 (Shannon's Code, Sec. 4472): 'Action for the use and occupation of land and for rent accrues against the sureties of guardians, executors and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, malfeasance in office, actions on contracts not otherwise expressly provided for within six years after the cause of action accrued.'

The circuit judge held that the first of the above sections was applicable, and that three years was the limitation.

We are of the opinion that this was correct. This action is for the detention or conversion of the plaintiff's property. It is true the contract for carrying the goods is averred, and

that the defendant failed to comply with it. Yet the gist of action is the detention or conversion of the property, by which it was lost to the plaintiff."

It is true, as stated by the Court, that the three year statute of limitations is not expressly applicable to **actions of "trespass on the case," eo nomine,** but the holding is that all actions in this form, as authorized by the Code must be barred by this statute of limitations, as the other section included in the quotation referred to actions **ex contractu.** As stated by the Court, the gist of the action was for the detention or conversion of specific property by which it was **lost** to the plaintiff, the action being therefore one for tort upon which money was sought as damages. And although in form an action on the case, and therefore not expressly included in the statute of limitations, it was nevertheless included therein on account of the nature of the action.

Other cases cited by us in our former brief in line with those above are Ramsey vs. Temple, 3 Lea, 252; Rhea vs. Hooper, 5 Lea, 390.

The cases construing the words "injuries to persons, property or character, involving unliquidated damages," found in the act conferring jurisdiction on courts of equity of actions at law, do not conflict with the cases cited construing the same language in the statutes of limitations. Equity has never taken jurisdiction under this act except where assumpsit would lie at law. State for use vs. Kellar, 11 Lea, 399, 402.

Nor is there any conflict in the case cited by Judge Lurton where the tort was **waived** and compensation sought for the actual value of the specific property converted.

HOW THE CODE OF 1858 IS CONSTRUED.

As before stated, the value of a chattel fraudulently paid for in counterfeit bank bills, loss in the value of an article bought on false representations, and a debt, lost by

deceitful representations as to the buyer's solvency, were injuries for which it was necessary to sue in case and which were therefore expressly barred in three years by the Act of 1715. In each of these cases the injury was to property and the plaintiff was injured in his property. And, as the Code is construed, this would still be so, according to the following cases:

Several years prior to 1858 the Legislature of Tennessee appointed Return J. Meigs and Wm. F. Cooper to revise and digest the statutory laws of the State. Their compilation was reported to the Legislature and adopted as the Code of the State in 1858. All the statutes thus digested were repealed. But the Courts of the State have never ceased to refer to them for light in construing the Code in all cases of doubt This rule is thus stated in Tennessee Hospital vs. Fuqua, 1 Lea, 611:

"Ordinarily, the repeal of an existing statute and the re-enacting it in different language, would raise a fair inference of a change in the legislative intent, and justify the reconsideration of previous rulings with a view to the new intent. But the declared object of the Legislature in the appointment of the revisers, whose work is embodied in the Code, was, in the language of its resolution, 'to revise and digest' the existing statutes, not to alter them. And this Court has accordingly, in view of this fact, said that one general rule in relation to the construction of the Code is 'that in doubtful cases it will be presumed that it was not intended to change, but only to revise or compile the old statutes.' Bates v. Sullivan, 3 Head, 633."

This is the language of Judge Wm. F. Cooper who was himself one of the revisers who compiled the Code.

Again in Burgner vs. Burgner, 11 Heisk., 726-734, it was said that the Code was intended to be "an embodiment" of the statutes then in force, and that:

"It has been repeatedly held that the Code in cases of doubt, is to be construed in reference to the statute law in force and existing at the time of its enactment."

The case of White Street Turnpike Co. vs Davidson County, 14 Lea, 73-76, also decided by Judge Cooper, is another illustration of construing the Code according to the meaning of the statute from which the provisions were taken.

The change in the form of the several actions of tort, as affected by Section 4438 of the Code, did not change their nature. As said by the Supreme Court of Tennessee, this section only means: "That the profusion of expression with little substance might be omitted; that matter without multiplicity of words, is all that is to be required in notifying an adversary of what he is to answer or defend. (Cherry vs Hardin, 4 Heisk., 202.) It was accordingly held in this case that an action for the conversion of property, was still a tort, and died with the person.

Finally, to balance the weight of Judge Lurton's opinion on the other side of this question, we refer to the contrary decision of Judge Clark, who has grown to eminence as lawyer and Judge from a special knowledge of the laws of Tennessee.

But at last the question involved is one that depends primarily on the construction of the Act of Congress. For, if, by the language used in that Act, the intent was to denote "injuries to property" as distinguished from injuries to the person; or, as the same idea might be expressed from another point of view, "injuries to a person in his property," then the Tennessee Statute, and identical statutes in the Codes of other States, would all apply by their express terms.

THE ONE YEAR LIMITATION.

We ask for a reconsideration on the ground that the action, authorized by Congress, is a penal one, within the mean-

ing of State Statutes barring civil suits of that character. But we can add nothing to the former brief on this question. If the decision of Mr. Justice Brewer in Goodridge vs. Union Pac. Ry. Co. 35 Fed. R., is not on all fours with this case, then we waive this point, and rely alone upon the other.

Respectfully submitted,

FOSTER V. BROWN,
FRANK SPURLOCK.

No. 94.

FILED.
NOV 8 1906
JAMES H. MCKENNEY
CLERK

BRIEF OF COUNSEL FOR

DEFENDANT IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

~~No. 365~~

CHATTANOOGA FOUNDRY AND PIPE WORKS
AND
SOUTH PITTSBURG PIPE COMPANY,
PLAINTIFFS IN ERROR.

VS.

CITY OF ATLANTA

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

19,867

No. 365

SUPREME COURT of the UNITED STATES.

October Term, 1906.

CHATTANOOGA FOUNDRY and PIPE WORKS
and
SOUTH PITTSBURG PIPE COMPANY,
Plaintiffs in Error.

vs.

CITY OF ATLANTA,
Defendant in Error.

BRIEF OF COUNSEL
for Defendant in Error.

STATEMENT OF THE FACTS

"This was an action to recover damages under the seventh section of the act of Congress of July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), known as the 'Anti-Trust Act.' The plaintiff is a municipal corporation of the State of Georgia. The defendants are two manufacturing corporations of the State of Tennessee, engaged in the business of making and selling cast-iron pipe and fittings.

"The declaration averred that on or about the 28th of December, 1894, the said two companies entered into an unlawful combination for the purpose of restraining inter-State trade and commerce with four other corporations, engaged in the same line of manufacture, to-wit, the Anniston Pipe & Foundry Company, and the Howard-Harrison Iron Company, both corporations of the State of Alabama, and conducting business in that State; the Dennis, Long & Co., a corporation of the State of Kentucky, and carrying on its business in said State; and the Addyston Pipe & Steel Company, a corporation of the State of Ohio, engaged in business at Cincinnati, in that State.

The declaration, in substance, charges that the plaintiff was engaged in conducting a system of water-works, and that it derived a large revenue from the sale of water to private consumers, the income going into the city treasury; that for the purposes and uses of its said water-works business, it bought during the operations of said unlawful trust a large supply of iron water pipe and fittings, and that the contract for its supply of such pipe was given to the Anniston Pipe & Foundry Company as the lowest bidder; that all of said pipe and fittings sold and furnished as alleged, were shipped by said Anniston Pipe & Foundry Company, from its plant in Anniston, in the State of Alabama, to plaintiff in the city of Atlanta, in Fulton County, in the State of Georgia. It is then averred that, by reason of said unlawful agreement between the said producers of said pipe, all competition was suppressed, and that the said

Anniston Company obtained the contract through an arrangement by which it was to be allowed to obtain same at a price agreed upon between said conspirators, without any competition, and that for this privilege it agreed to pay and did pay to the said association a large sum, called a 'bonus,' which was to be divided between the parties to said arrangement in agreed proportions. It is, in effect, charged that the 'bonus' constituted the difference between the fair and reasonable value of the pipe so bought by plaintiff, and the price which it was compelled to pay, and that this large and unreasonable price was extorted from plaintiff through the unlawful suppression of competition, and by the instrumentality of fictitious bids put in by the other parties to said association, so arranged as to create the semblance of competition, and yet secure the contract for the Anniston Company at the price set by the combination as the ostensible lowest bidder. The plaintiff avers that, by reason of the formation of said illegal combination, inter-State commerce in cast-iron pipe was restrained, and plaintiff compelled to deal only with the said Anniston Company, and to pay a price agreed upon by all the members of the combination, which was unreasonable; that the bonus so paid out of the price paid by plaintiff was paid in a common pocket, and divided among conspirators in an agreed way; and that the two Tennessee corporations here sued received their due proportion of said bonus, according to the terms and plans of the scheme. By all of which the plaintiff avers that it was compelled to pay for the cast-iron pipe so bought and used in its said water-works, $17,413.10 more than would have been paid but for the said unlawful trust between the producers of such pipe, and it lays the damage to its business and property at triple the said excess price as paid and reasonable attorneys' fees."

See Declaration. Transcript of Record pp. 2, 3, 4, 5, 6.

See Declaration. Transcript of Record pp. 18 and 19.

See Amendment to Declaration. Transcript of Record, p. 34.

See Amendment to Declaration. Transcript of Record pp. 37, 38, 39, 40.

The foregoing is substantially a reproduction of the statement of facts made by the Honorable Horace H. Lurton, one of the Circuit judges, who tried the case in the Court of Appeals for the Sixth Circuit.

City of Atlanta vs. Chattanooga Foundry & Pipe Works, et al. 127 Fed. Rep., pages 24 and 25.

The defendants demur upon the following grounds:

(*a*) The facts alleged in this declaration do not authorize a recovery under the act of Congress, passed July 2, 1900, known as the "Sherman Anti-Trust Act."

(*b*) The facts alleged are insufficient to authorize a recovery.

(*c*) It is not alleged that plaintiff was engaged in inter-State commerce or trade at the time of the wrongs complained of.

(*d*) The wrongs and injuries suffered by plaintiff are not the direct and immediate effect of the unlawful combination of restrained trade complained of; and

(*e*) It does not appear therein that plaintiff has suffered any damage in its business or property by reason of the contract or combination entered into between the defendants and other pipe companies named in the declaration.

See Demurrer. Transcript of Record, pp. 26, 27.

The Circuit Court overruled this demurrer.

See Court Order. Transcript of Record, p. 25.

The defendants then plead the general issue of not guilty, and the Tennessee statutes of limitations of one and three years.

See Pleas. Transcript of Record, pp. 25, 26.

Plaintiff demurred to defendants' pleas of the Tennessee statutes of limitations of one and three years.

See Demurrer to Pleas. T. R. pp. 27, 28.

The Circuit Court sustained plaintiff's demurrer to said pleas of the Tennessee statutes of limitations of one and three years.

See Order T. R. pp. 43, 44.

The issues were then submitted to a jury, which found in favor of the plaintiff, and judgment was entered accordingly.

See verdict and judgment T. R. pp. 44, 45.

Defendants made a motion for a new trial (T. R. pp. 45, 46), and assigned errors in support of same (T. R. p. 82), which motion was overruled by the court (T. R. p. 83), and the defendants took the case by writ of error to the United States Circuit Court of Appeals for the 6th Circuit (T. R. pp. 84, 85, 86, 87, 88). The Circuit Court of Appeals affirmed the judgment of the court below (T. R. p. 92).

The defendants have brought the case to this court by ap-

peal, and contend that the Circuit Court of Appeals committed error:

(*a*) In affirming the action of the Circuit Court in overruling the defendants' demurrer to plaintiff's declaration.

(*b*) In affirming the Circuit Court in sustaining plaintiff's demurrer to defendants' third plea, being the plea of the statute of limitations of the State of Tennessee of one year, bcause the suit was one for the collection of statutory penalties.

(*c* In affirming the Circuit Court in sustaining plaintiff's demurrer to the fourth plea, being the plea of the statute of limitations of the State of Tennessee of three years, because said suit was one for injuries to plaintiff's property or business inflicted by the tort or wrongs of the defendants.

(*d*) In affirming the action of the Circuit Court in refusing to instruct the jury as follows: "If it appears that the pipe purchased by the plaintiff from the Anniston Pipe Co. was sold and delivered to plaintiff more than a year before this suit was brought, then there would be no recovery in this case, because the cause of action would in that case be barred in one year, under the statute of limitations of this State, limiting the right to bring such suits to one year; and

(*e*) In affirming the action of the Circuit Court in refusing to instruct the jury as follows: "If it appears that the pipe purchased by the plaintiff was sold and delivered to it more than three years before this suit was brought, then plaintiff could not recover, because under the statutes of limitations of this State for three years, such suit would be barred."

Brief.

With reference to the assignments of error falling under (*b*) and (*c*) next preceding, we call especial attention to the fact that there are no exceptions taken to the order of the Circuit Court in striking defendant's third and fourth pleas of the statute of limitations of one and three years. This order was passed on the 6th day of October, 1904. (Trans. 44.) But in a spirit of fairness we call attention to an apparent order in the record (Trans. 46), as follows: "The defendants are hereby allowed to amend the order of this Court entered at a former day of this term, sustaining plaintiff's demurrer to defendant's pleas of the statute of limitations so as to reserve

exceptions to said order." This order was filed Oct. 15th, 1904, and it does not appear from the record that it was allowed by the court. However, whether allowed or not, there is nothing in the record showing that the order of the Court striking said pleas was in fact amended so as to reserve exceptions to the action of the Court. And our contention is that the action of the Circuit Court in striking said pleas was final, because there were no legal exceptions taken thereto, and that the Circuit Court of Appeals was without jurisdiction to review the same, and that this Court will not consider the questions raised under said assignments (*b*) and (*c*) of error.

We respectfully submit that the assignments of error set out in (*d*) and (*e*) next preceding raise the same points of law adjudicated by the order of the Circuit Court in striking defendants' pleas of the statute of limitations of one and three years (Trans. 44).

We shall not attempt to refer to the many authorities cited by counsel for the plaintiffs in error in their printed brief.

On the first assignment of error, which raises the question as to whether the defendant in error has any cause of action under the Anti-Trust Act, as shown by the facts set out in its declaration, we desire to rely upon the clear, able and conclusive opinion of the Circuit Court of Appeals, delivered by Judge Lurton and printed in the Federal Reporter.

City of Atlanta vs. Chattanooga Foundry & Pipe Works, 127 Fed. Rep. 25-28.

It would be a work of supererogation on our part to attempt to add to or strengthen the reasons advanced by Judge Lurton in sustaining the court below in its action in overruling the demurrer to plaintiff's declaration.

Second Assignment of Error.

As to opposing counsel's brief with reference to the second assignment of error, we merely desire to say that if it be true, as they contend, that plaintiff's cause of action was for the recovery of a statutory penalty, that, inasmuch as it was created by an Act of Congress, therefore the statute of limitations of the State of Tennessee, with reference to statutory penalties,

would not apply, but Section 1047 Revised Statutes (U. S. Comp., St. 1901, p. 727) would apply.

Raymond vs. United States, 14 Blatchf. 51.

Campbell vs. Haverhill, 155 U. S., 610-614.

Brady vs. Daly, 175 U. S. 148.

But the Circuit Court and the Circuit Court of Appeals both held that plaintiff's suit was not a penal action.

City of Atlanta vs. Chattanooga Foundry & Pipe Works, 127 Fed. Rep. 28.

In the City of Atlanta vs. Chattanooga Foundry & Pipe Works, supra, Judge Lurton says: "We find ourselves in agreement with the court below in holding that an action under the seventh section of the Act of July 2, 1890, c. 647, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), is not a penal action," and cites various authorities to sustain the position of the Court. In this same opinion he also says: "If this is an action to recover a penalty, within the meaning of this statute (1047 Rev. St.), the suit was brought in time. The shorter statute of the State, limiting the time for the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under the Act of Congress. It is only when there is no Federal statute that the limitations prescribed by the law of the State is applicable," citing Campbell vs. Haverhill and Brady vs. Daly, supra. The precise point decided by the courts below was that this suit was not for the recovery of a statutory penalty, and therefore was not a penal action. Plaintiff in error insisted in the court below that it was not a penal action; that the seventh section of the Anti-Trust Act was not penal but simply remedial in its nature. Defendant in error contended that the section was penal; that its action was penal and that its suit having been brought within five years was in time. If defendant in error was right in its position in the court below; that is to say, if its suit was for the recovery of a statutory penalty and its action penal, then section 1047 of the Rev. Stat. was applicable, and the judgment of the court below would be sustained by this Court, because the suit was not barred, and there is no other assignment of error that would effect the recovery except that raised on the general demurrer.

Third Assignment of Error.

Counsel for plaintiffs in error say that if they are mistaken

about the action being penal then defendant in error ought not to recover, because the suit is for the recovery of damages to personality, and is therefore barred by the State statute of limitations of three years. The Court of Appeals held that the statute of limitations of three years has no application to this action.

City of Atlanta vs. Chattanooga Foundry & Pipe Works, 127 Fed. Rep., 23, 30.

"In the City of Atlanta vs. Chattanooga Foundry & Pipe Works, supra, Judge Lurton, delivering the opinion of the Court, said: 'The limitation applied by the Court below was that prescribed by Section 4470, Shannon's Revision, Tenn. Code. Prior to the Tennessee Code of 1858 the statute of limitations operated upon the remedy, and applied to the form of action. By the Code then adopted, and its amendments, the limitation now applies to the cause of action. Kirkman vs. Philips' Heirs, 7th Heisk. 222; Callaway vs. McMillian, 11th Heisk. 557. The limitations of actions other than real are found in Sections 4466 to 4483 inclusive, Shannon's Code of Tennessee. Section 4466 provides that 'All civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter unless otherwise expressly provided.'

"Section 4469, among other things, prescribes that actions for statutory penalties shall be brought within one year."

"Sections 4470, 4472 and 4473 must come under consideration, and are here below set out in full."

"Section 4470. Actions for injuries to personal and real property; actions for detention or conversion of personal property within three years from the accruing of the cause of action."

"Section 4472. Actions for the use and occupation of land and for rent; actions against sureties of guardians, executors and administrators, sheriffs, clerks and other public officers, for non-feasance, misfeasance and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued."

"Section 4473. Actions against guardians, executors, administrators, sheriffs, clerks and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other State or government, and all other cases not

expressly provided for, within ten years after the cause of action accrued."

"The learned trial judge held this action to be one for injury to property within the meaning of Section 4470, and therefore barred in three years. To this we can not assent. That section plainly applies to causes of action arising out of some injury to property as distinguished from its detention or conversion. Property, either personal or real, may be injured or damaged without its being either detained or converted. But whether the cause of action be an injury or damage to the property or for its taking or detention, the suit must be brought within the same period."

"This distinction between the two kinds of injury to tangible property is of very ancient origin." (Citing and quoting from Sir William Blackstone (Volume 3, 145, 153)."

"We find in a very carefully selected verbiage of Section 4470 a recognition of the two kinds of injury to which tangible property is susceptible—one by a damage which does not effect the possession, and the other by a taking or detention which does."

"While the precise question has not been decided by the Supreme Court of Tennessee, we do find an indisposition to give to the section any such broad and indeterminate meaning as would include a suit which does not involve *any actual injury to property.* Thus this section was held not to apply to a suit against an attorney for the negligent loss of a debt entrusted to him for collection. Bruce vs. Baxter, 7 Lea, 477; Ramsey vs. Temple, 3 Lea. 253. Nor to the suit of a stockholder, in behalf of the corporation, against bank directors, for the negligent discharge of their duties, by which the corporation had sustained losses. Wallace vs. Lincoln Savings Bank, 89 Tenn. 631."

In Kirkman vs. Philips' Heirs, 7 Heisk. 222, 225, the Court said: "The statute of limitations applicable depends upon the nature and character of the action, and not upon its form." In the same case it was held that, although the forms of action have been abolished by the Code, an owner of personal property, whose right to sue for damages for its conversion was barred by the statute of three years, might waive the tort, and sue for the value upon the implied assumsit, in which case his suit would not be barred in six years; that being the time in which

a suit upon a contract might be brought." See also, Alsobrook vs. Hathaway, 3 Sneed, 454."

"Actions on statute liabilities, not being a statute penalty, and not dependent upon any contract, express or implied, are actions not otherwise "expressly provided for by any of the other sections of the chapter upon the limitations of actions other than real." Such an action is at the common law—in the nature of an action upon a specialty—and is of a similar kind to those enumerated in Section 4473, Shannon's Code. Under the statute of 21 James I., c. 16, all actions "upon the case," with certain exceptions, and "all actions of debt grounded upon any lending or contract without specialty," were barred unless commenced within the time named in the statute. But an action of debt which was grounded upon a specialty was not within the statute. Specialties were not within the evil intended. Angell on Limitations, Par. 80; Jones v. Pope, 1 Saunders, 38; White v. Parkin, 12 East, 578; Brown on Actions at Law, 345; Bullard v. Bell, 1 Mason, 243, Fed. Cas. No. 2, 121; 4 Bacon, Abridgment, 471. But the statute of James operated upon the form of action. Thus all actions "upon the case," whatever the cause of action, were within the bar of the statute, and so were "all actions of debt grounded upon any lending or contract without specialty."

In Carroll v. Green, 92 U. S. 509, 23 L. Ed. 738, it was held that a suit by creditors of a corporation to enforce their claims against stockholders under a clause of the charter rendering them individually liable was barred by the South Carolina statute; being, in substance, the Act of 21 James I., c. 16. The reason given for this result was that the charter was a mere offer or proposal by the State, which the stockholders could accept or reject, and that by taking stock they assented to the liability imposed, and that the assent thus given and promise implied was the ground of liability, and that the action of the case would lie upon such an implied promise, which action was within the bar of the statute. The Court, however, went further, and held that the action or suit was not on the statute and was therefore not an action on a specialty. "The statute," said the Court, "was only inducement. The implied promise of the stockholders to fulfill its requirement was the agreement on their part, and it was without specialty." The distinctions made in the case are quite refined, and turn upon common law

forms of action. So far as the case goes upon the ground that the charter involved a mere proposal, and that the liability of the shareholder was grounded upon his implied agreement, it is in accord with the great current of authority."

"The statute of James, as amended by Act N. C. 1715, c. 21, was in force in Tennessee until adoption of Tennessee Code of 1858. Act N. C. 1715, c. 31, Scott's Revisal, vol. 1; Pea v. Waggoner, 5 Hayw. 19; Tisdale v. Munroe, 3 Yerg. 320. By the Code, the statutes no longer operate upon the form, but upon the cause, of action; and, by section 4473, every cause of action not otherwise expressly provided for is barred, without regard to whether it be upon a specialty or not."

"It is impossible, having any regard to the verity of things, to conceive how any action would lie, under the seventh section of the anti-trust act, upon any implied agreement of the defendants to compensate the plaintiff for the injury to his business and property. But if we could torture an implied agreement out of the transaction, the defendants would be in no better plight for, if the cause of action be a contract, express or implied, the action would not be barred for six years. Shannon's Code, Par. 4472. We are, however, of the opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years."

But counsel for plaintiffs in error contend that the Circuit Court of Appeals has committed an error in holding that the three years' statute does not bar the right of action of the defendant in error, and after admitting in their brief that "the statute of limitations operates on the cause, and not on the form of the action," they now in effect ask the Court to overrule, Kirkman vs. Philips' Heirs, 7th Heisk, 222, 225, in which the Court said: "The statute of limitations applicable depends upon the nature and character of the action, and not upon its forms," by insisting that plaintiff's action is an action on the case, and is therefore barred in three years. They insist that because plaintiffs in error committed a wrongful act by which plaintiff was injured in its business and because, as they say, the action is an action on the case, that, therefore, the suit is for a tort and that the three years' statute applies. We insist that the Court of Appeals did not commit error in holding that the three years' statute has no application to the cause at bar.

We beg to quote from "State for use vs. Keller," 11th Lea 401, a Tennessee case, which was a suit for breach of the official bond of the surveyor, which, by Code, Sec. 436, is conditioned "for the faithful performance of his duties as surveyor." In that case, Judge Freeman said: "It is urged that this cause of action is not within the jurisdiction of the Chancery Court under the Act of 1877, increasing that jurisdiction, (chancery) but is purely an action for tort, and for the recovery of unliquidated damages."

"We have held, however, at the present term, in the case of Glenn vs. Moore, 11 Lea, 256, that a clerk of the Circuit Court was liable on his bond for failure to take proper sureties or supersedeas bonds, whereby a quantity of wheat levied on by an execution was released and its proceeds lost. We are unable to distinguish that case in principle from this. Then the measure of recovery was the value of the property released by the wrongful act."

Judge Freeman also said:

"It is not a case for injury done "to person or property" within the language of the statute, as in the case of a trespass, to the one or the other, but is the case of loss accruing by reason of alleged breach of duty, which is measured by the value of the property assumed to be lost."

In Glenn vs. Moore, Supra, Judge McFarland said: "The facts of this case do not bring it within the above exception, (to-wit: 'That from and after the passage of this Act, no demurrer for want of jurisdiction of the cause of action shall be sustained in the Chancery Court except in the case of unliquidated damages for injuries to person, property or character.") or constitute an injury to property within the meaning of the Act. By the levy of the execution, the title to the specific property was vested in the officer for the satisfaction of the judgment. By reason of the failure of the clerk to discharge his official duty, it was released and lost, and by virtue of the obligatory force of his official bond, the complainant became entitled to recover of him and his sureties the value of the wheat."

Thus, it will be seen that the defendants in these suits had been guilty of wrongful conduct which resulted in loss and injury to the plaintiffs, but still the Supreme Court of Tennessee held that it was not *an injury to personal property* or *to the person,* and it will be seen in every case in which an injury or

loss resulted to the plaintiff by wrongful conduct of the defendant, which was not the result of injury to personal property, the statute of three years' limitations has never been applied.

Our contention is that the Limitation Act of Tennessee of three years is applicable to suits "for injuries *to* personal property," and not to suits where the action is for injuries sustained by the plaintiff in his business or property; the former involves physical invasion of the property itself without disturbing property rights or possession; the latter embraces deprivation and diminution of assets.

Unless the injury for which the Act of Congress provides a remedy is, *eo nomine* or by necessary implication, covered by State statute, the Limitation Act of a State does not apply. In the case at bar Congress does not in so many words give redress for an injury *to* personal property, nor does it do so by necessary implication; nor could it do so, we respectfully submit, from the very nature of the injury or damage, for the reason that, damage to personal property necessarily involves the idea of the thing injured and the *person* inflicting the injury being present at one and the same time and at one and the same place; this is a wrong in its very nature *intra* State, cognizable only by the State, and Congress would have no power to legislate on such a subject because not inter-State and the courts will not presume that Congress undertook to do so.

Section seven of the anti-trust Act provides that "Any person who shall be injured in his business or property by another person or corporation, by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States, etc." By comparing the language of this section with that of the Tennessee Act it will be seen that there was a distinction between the action for "injury to personal property" and one "injured in his business or property." To illustrate: If a wrongdoer maims or cripples the horse of the owner in such a way as to make him less valuable, that would be damage to personal property; if on the other hand the wrongdoer should attempt to deprive the owner of his property altogether, that would be a damage to the owner *in* his property. Or, again, if the wrongdoer should so mutilate a silver dollar of the owner as to render it less valuable, that would be damage to his property; if he should take the silver dollar from the owner, he wouldn't hurt the dollar, and it would

be damage *to the owner in* his property. The Supreme Court of Georgia in the case of Blocker vs. Boswell (109. Ga. 230) had this question of the distinction between injuries to personal property and injuries in property, under consideration, and Mr. Justice Lewis, who delivered the opinion of the Court, went into the question so fully and so ably that we quote from his decision. The real question in that case was as to the jurisdiction of a justice of the peace in actions of trover, which is really an unlawful detention of the personal property of another, and in discussing the question he used this language: "The controlling question which arises in this case is whether or not, under the present Constitution of this State, a justice's court has jurisdiction to try an action in trover. That Constitution declares: 'Justices of the peace shall have jurisdiction in all civil cases arising *ex contractu,* and in cases of injuries or damages to personal property, when the principal sum does not exceed one hundred dollars" . . . "We think it is perfectly clear that such a suit (trover) can not properly be classified among cases of injuries or damages to personal property." The words "injuries or damages" were evidently intended to be synonymous; and when applied to property they mean some *physical injury* to the property itself, some trespass upon it, by virtue of which its value has become diminished or destroyed. Conversion implies no such injury.. An action of trover, therefore, has no reference to any injury or damage which the property itself may have sustained. Indeed, after its conversion, it may actually be enhanced in value by the wrong-doer; yet even if this were done at his expense, it would have no effect upon the owner's right to recover back his property by trover. On the other hand, if the personalty, while in the unlawful possession of the defendant should be materially injured or damaged by him, and the plaintiff should discover this fact after recovering the property itself by an action of trover, we see no reason why he would not have the right to institute another and an independent action for damages resulting from such physical injuries. And again, on page 239 of the opinion the learned judge uses this language: "Damage to the property, and not simply *to the owner,* was made the constitutional test of jurisdiction in that case," referring to White Star Co. vs. County of Gordon, 81 Ga. 47.

In the case we are now considering, the property acquired by

the city of Atlanta from the defendants was cast-iron pipe, and the suit is not brought for damage to this pipe, but is brought for injury which the plaintiff sustained by reason of the unlawful conspiracy and combination on the part of the defendants and others which forced the plaintiff to pay an amount for said pipe considerably in excess of the price at which they could have purchased it but for said unlawful combination. And to say that the plaintiff's suit is for damage *to* personal property we respectfully submit is wholly untenable.

In Bassett vs. Bassett, 20 Ill. Appeals, 543, the suit was action on the case, charging defendant with wrongfully and maliciously enticing plaintiff's husband to separate himself from her, whereby she was deprived of his society, affection, protection and support, for which plaintiff sought to recover damages—to which action defendant plead the Statute of Limitations of two years. Plaintiff demurred to this plea and demurrer was sustained.

In delivering the opinion of the Court in Bassett vs. Bassett, 20 Ill., App. 547-548, Judge Pillsbury said:

"It is next objected that the Court erred in sustaining the demurrer to the Statute of Limitations of two years. The section of the statute upon which the plea is based provides that "Action for damages for an injury to the person, or for false imprisonment, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years." Applying the familar principle that the statute does not bar a cause of action unless it comes clearly within its provisions, we are of the opinion that the section relied upon is not broad enough to include the present case. The cause of action for an injury *to* the person which is barred in two years is limited to a direct physical injury to the person. If it were intended to include all injuries to personal and relative rights, the Legislature would not have considered it necessary in the same act to provide specially for a period of time in which an action should be brought for many of the injuries to such rights. Thus actions to recover damages for slander and libel, false imprisonment, malicious prosecution, abduction, seduction and criminal conversation, are expressly provided for, showing the clear intent of the Legislature to limit "injuries to the person" to those of a physical nature. This case is one of those not specially provided for, and would therefore seem to be governed by

the fifteenth section of the Act making five years the limitation.

There is a striking similarity between the statute of limitations of Illinois and Tennessee; the only substantial difference being as to time.

We cite the following cases on "liability created by statute" and the statute of limitation applicable thereto:

Lane vs. Morris, 10 Ga. 162.

Atwood vs. Rhode Island Bank, 1 R. I. 376.

VanHook vs. Whitlock, 2 Edw. Ch. (N. Y.) 304.

Shackelford vs. Slaton, 117 N. C. 73.

Seymour vs. Pittsburg Ry. Co., 44 Ohio St. 12.

In VanHook, administrator, etc., et al. vs. Whitlock, et al. 2 Edwards Chan. Repts. (N. Y.) 311, the Vice-Chancellor said: Ch. Baron Comyn lays down the law that, upon every statute made for the remedy of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute, or by implication. Com. Dig. Tit. Action upon statute, A1 and Judge Story has said that this is correct: Bullard vs. Bell, 1 Mason's R. 290." The Vice-Chancellor also said: "Although there is no penalty or forfeiture imposed under the act incorporating the Commercial Insurance Company, we see, by the 12th section, a cause of action given in favor of creditors, who happen to be the parties aggrieved by the non-payment of the debt of the corporation arising to them by implication and to none but creditors; because being a remedial statute, no other than the injuried parties can sue."

We beg to call attention to the case of Seymour vs. Railway Co. 44 Ohio St. 12, 17 (3): "This is an action brought against the Pittsburg, Cincinnati & St. L. Rwy. Co. under the statute as amended April 18, 1874 (71 Ohio L. 83) for the recovery of damages for the killing of domestic animals by reason of want and insufficiency of fence and cattle-guards along the line of defendant's railroad."

Judge Johnson, delivering the opinion of the Court, said: "As the petition on its face showed that the cause of action accrued more than four years and less than six years before commencement of the action, the question is fairly presented whether the Court below erred in holding that it was barred by the four years' limitation. We think it did."

"Subdivision 3, Chap. 2, Div. 2, Tit. 1. Part Third of the Revised Statutes, relates to civil actions other than for the re-

covery of real property. Section 4981 of the Revised Statutes limits actions upon contract not in writing, express or implied, and actions upon a liability created by statute, other than a forfeiture, or penalty, to six years.

"Section 4982 limits actions of trespass, the recovery of personal property, the injury to the same, or to the rights of plaintiff, not arising on contract, etc., to four years from the time the right of action accrues."

"This section relates to actions *ex delicto* and for frauds, as distinguished from actions *ex contractu*. All causes of action for wrongful act, neglect, or default, not otherwise provided for, are barred in four years; while under section 4981, all causes of action arising on verbal contracts, express or implied, and all causes of action where the liability is created by statute, are barred in six years."

"This is a liability created by statute. Without the statute such an action could not be maintained."

No doubt, the suit at bar could not be maintained, but for the Seventh Section of the Sherman Anti-Trust Act.

We invite comparison of this section with section 4470 of Shannon's Tennessee Code. The former is as follows:

"Any person who shall be injured in his business or property by another person or corporation, by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The latter is as follows:

"Actions for injuries to personal and real property; actions for detention or conversion of personal property within three years from the accruing of the cause of action."

It evidently follows from this comparison, that the class of actions provided for by the Seventh Section of the Sherman Anti-Trust Act is not confined to physical injuries to personal and real property; while the language of section 4470, Shannon's Code, restricts the limitation of three years to actions for injuries to personal and real property.

State for Use vs. Keller.
11 Lea, 401.
Glenn vs. Moore.
11 Lea, 256.

It is not an action for injuries to personal or real property within the language of Section 4470, Shannon's Tennessee Code, as in the case of a trespass, but it is the case of loss accruing to the city of Atlanta by reason of the unlawful acts complained of which is measured by the difference between the fair market value of the pipe and the illegal price paid therefore by defendant in error.

Section 4470 has no application for the reason that the cause of action does not fall within its terms. It is not an action for an injury to property, but for an injury to a person in his business or property.

It is not an action on contract either express or implied; or for the use and occupation of land and for rent; or against sureties of guardians, etc., and therefore Section 4472 Shannon's Tennessee Code has no application.

It is not an action for a statutory penalty.

It is not an action against guardians, executors, administrators, sheriffs, or other public officers on their bonds, or on judgments or decrees of any court.

And, therefore, it must fall in the class of actions "not expressly provided for" and is not barred "within ten years after the clause of action accrued," according to Section 4473, Shannon's Code of Tennessee.

We submit that there is no reversible error in the judgment of the Circuit Court of Appeals.

Respectfully submitted,

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